IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1900.

C. S. THOMPSON ET AL.,
*Plaintiffs in Error,*

*v.*

THE LOS ANGELES FARMING AND MILLING COMPANY,
*Defendant in Error.*

*No.* 87.

## Supplemental Brief for Plaintiffs in Error.

The essential facts of this case and the points on which the plaintiffs in error rely for a reversal of the judgment of the Supreme Court of the State of California have been so fully presented in the two briefs already filed by the late Hon. Z. Montgomery who had charge of the case in the courts below, on behalf of the plaintiffs in error, that this brief will necessarily be limited to a comparatively narrow compass. A brief statement of the material facts in the case and an elaboration of some of the points made in the two preceding briefs referred to is all that will be attempted.

## Statement of the Case.

This was an action of ejectment brought by the defendant in error, a corporation, in the Superior Court of the County of Los Angeles, California, against the plaintiffs in error and certain other defendants who have since dropped out of the case, to recover a large tract of land in that county, alleged to have been patented to its predecessors in interest, in 1873, for what was known as the ex-Mission of San Fernando, purported to have been granted by Pio Pico, the provisional governor of California, on the 17th of June, 1846, to Eulogio de Celis.

The defences set up in the trial court, and afterwards relied on in the Supreme Court of the State of California, were, that this alleged Mexican grant was absolutely void; that the alleged patent therefor was likewise void, and did not, and could not, operate as a conveyance of title to this tract of land out of the United States; and that these void instruments of title could be shown to be void and of no effect in this action of ejectment.

The grounds upon which these defences were based were:

*First.* That, inasmuch as the alleged grant on its face purported to have been made by Pio Pico in June, 1846, for an expressed money consideration, and was not what was known in the Mexican law as a grant in colonization, it was without authority in law, and, therefore, a mere nullity, under numerous decisions of this Court which will be more particularly referred to hereafter.

*Second.* That this alleged grant purported and pretended to convey Mission lands; and, inasmuch as under the laws of Spain and Mexico, the governor of the Californias did not have any authority in 1846, or at any other time, to convey and sell Mission lands, therefore, for a second reason, the pretended grant was, and should be held to be, void and

a mere nullity, under certain other decisions of this Court which will be subsequently referred to.

*Third.* That there having been no authority in the governor of the Californias, under the laws of Spain and Mexico or under any other law or regulation, to make the alleged grant, either as a part of the public domain of Mexico, or as Mission lands, there was no authority in the board of land commissioners created by the Act of Congress of March 3, 1851, to entertain consideration of, much less confirm, the same; in other words, that the claim as presented to the said board of commissioners for confirmation showed on its face that it was not "*a claim to lands in California by virtue of any right or title derived from the Spanish or Mexican governments;*" and, therefore, the decree of confirmation was without authority of law, and was also absolutely void and a mere nullity.

*Fourth.* That the pretended grant being void, and the pretended decree of confirmation being also void, therefore the alleged patent issued in 1873, based upon said void grant and said void decree, all of which null and void features appeared upon the face of the patent itself, was also null and void and did not, and could not, convey any title to these lands to the pretended grantee; and he in turn could not convey any title to anyone else that could not be successfully attacked in a court of law, under a long line of decisions of this Court commencing in the time of Chief Justice Marshall and continuing down to the present time.

It was also contended by the defendants in the courts below, and a great deal of the record is made up of evidence tending to prove, that there had never been any actual survey on the ground of this pretended grant after its attempted confirmation and prior to the issue of what purported to be a patent in 1873.

It will thus be observed that the basic feature and prin-

ciple of the defence was, that this alleged grant made by Pio Pico in June, 1846, was without any authority in law, and was, therefore, void and a mere nullity, and that, as the grant was void, then all the subsequent proceedings and instruments in the chain of title must of necessity fail.

The plaintiff in the court below (defendant in error here), in order to make out its case, relied on the alleged patent which it introduced in evidence (Rec. 41, 42), and also introduced certain conveyances which tended to show that it was the holder of whatever title had been conveyed to the original grantee (Rec. 107), and also introduced certain oral evidence tending to show its possession of the tract from 1873 down to the date when it was alleged the defendants had taken possession thereof.

In order to make out their defence that the grant was absolutely void, the defendants attempted to introduce in evidence the original petition presented by the claimant to the board of land commissioners asking a confirmation of his pretended claim (Rec. 233), and also attempted to introduce as evidence the original grant made by the governor of the Californias (Rec. 235), which were the muniments of title presented to the board of commissioners under the act of March 3, 1851; but the trial court refused to permit the introduction of these papers as evidence, and held that the defendants could not go behind the pretended patent (Rec. 242); to each and every of said rulings the defendants excepted and those exceptions are made the basis of the assignments of error here. The court then instructed the jury to bring in a verdict for the plaintiff (Rec. 278); and judgment having been entered on the verdict (Rec. 289), an appeal was taken to the Supreme Court of the State of California where the judgment below was affirmed (Rec. 289.) From this affirmance this writ of error was prosecuted.

The assignments of error are set forth in full on page 299 of the record, and are found on page 5 of Mr. Montgomery's first brief filed in this Court. They will not be repeated here.

ARGUMENT.

Two principal questions arise under these assignments of error:

*First.* Was the alleged grant on which the pretended patent was based void for want of authority, in the governor of the Californias, in 1846, under the laws of Spain and Mexico to make it? and—

*Second.* Could this void character of the grant and the subsequent proceedings and instruments purporting to convey title be shown by the defendants in a court of law, in an action of ejectment?

It is insisted on behalf of the plaintiffs in error that both of these questions must, under the law, as expounded by this Court, be given an affirmative answer.

*First.* It is insisted that this pretended grant was void for two reasons:

(*a*) In California, prior to the occupation of the territory by the military forces of the United States, the only laws in force for the disposal of the public domain by the provisional governor of the province was what was known as the colonization act of the Mexican congress of 1824, and the regulations of 1828 which were made by the supreme government for the enforcement of that act; and, inasmuch as this de Celis grant did not pretend to be a grant in colonization, it was, of necessity, in the very teeth of the law, and was, and must be held to be void, and an absolute nullity.

(*b*) The governor of the Californias did not have any authority under that act and those regulations to make a

grant of mission lands; and, therefore, this pretended grant to de Celis was null and void for another and additional reason.

These propositions will be considered in the order in which they are presented.

*First.* What was the power of the governor of the Californias, in 1846, to make any grants of land in that province?

In *United States* v. *Cambuston*, 20 How. 59, 64, this Court, referring to a grant somewhat similar to this one, made by Governor Pico on May 23, 1846, said:

> "In the examination of the evidence in this case, we have found it very difficult to resist a suspicion as to the *bona fides* of the grant in question. * * * It was made but a month and a half before the country was taken possession of by the arms of the United States, and made by a person who had but recently expelled from the Territory by force its lawful governor (Micheltorena) and taken possession of it himself. Whether or not Pico had been recognized by the existing government in Mexico does not appear. Micheltorena was overthrown by the joint forces of Castro and Pico in the spring or forepart of the summer of 1845. Civil commotion raged throughout the Territory from this period down to the 7th of July, 1846, when the authority of Pico and Castro themselves was subverted, and possession taken and held by the arms of the United States until the cession of the country to this Government by the treaty of Guadalupe Hidalgo. The grant purporting to have been made by Pico, so near the time when the government of the territory had passed from his hands, and, indeed, during the very heat and conflict of the struggle in which his power was overthrown, it, and all others similarly situated, should be inquired into and scrutinized with great care, both as to the authority of the governor to make them,

> and the *bona fides* of its exercise, in order to prevent imposition and frauds. The Court below appears to have been very much pressed with the unsatisfactory character of the evidence, and with doubts as to the genuineness of the title, and seems to have yielded rather to the apparent acquiescence of the representatives of the government, in the decision of the commissioners, than to any settled convictions of its own judgment."

The Court thereupon reversed the decree of the court below which had affirmed the decision of the Board of Land Commissioners appointed under the act of March 3, 1851, confirming the grant, and remanded the case to the court below for a further hearing.

The above quoted remarks are particularly applicable to a grant made by this same Governor Pico, on the 17th of June, 1846, twenty-five days after the alleged grant in the case referred to. At that time the civil commotion referred to had increased, and this same Pico was making innumerable grants for a money consideration in order to raise funds wherewith to repel the forces of the United States in that Territory.

In *United States* v. *Hartnell's Executors*, 22 How. 286, 289, the power of the governor of California to make a grant of lands for colonization purposes for more than eleven square leagues of land came before this Court for consideration. There, be it remembered, no doubt could arise as to the power of the governor to make a grant of lands for colonization purposes, that being the very object of the act of 1824 and the regulations of 1828.

In speaking for the court, Mr. Justice Catron said:

> "The narrow question is, had the governor of California power in 1844 to grant gratuitously, for the purpose of tillage, inhabitancy and pasturage, more

than eleven leagues of land to any one person? Section 12 of the law of 1824 provides, that it shall not be permitted to *unite* in one hand, as property, more than one league of irrigable land, four leagues of farming land, not irrigable, and six for stock raising. * * * The public domain was the property of the Mexican nation, and those who were enabled to displace the title, separate portions of it from the public lands, and vest such portions into individual proprietors by perfected titles, could only do so in the exercise of sovereign power, because the public title was a sovereign right; and agents who assumed to exercise this authority must show that they represented the nation. *The governors of California do not show that they did represent the nation, so as to conclusively bind it;* to have this effect, the governor's grant must have the concurrence of the departmental deputation. It follows, that the assembly was the controlling power, and could reform or nullify the governor's grant."

In *United States* v. *Vallejo*, 1 Black, 541, the question of the power of the governor to make a grant of the public lands of California for a pecuniary consideration came squarely before this court for consideration; and it was there held that the only laws in force in the province of California under which the governor of the territory could make a valid grant were the act of 1824 and the regulations of 1828; that those laws and regulations only conferred upon the governor the power to make grants in colonization; and that he had no power whatever to make a grant of the public domain for a pecuniary consideration.

In that case, the claimant produced two alleged grants to a large tract of land in California, one purporting to have been made by the governor, in colonization, in 1843, under the act of 1824 and the regulations of 1828, and the other a grant founded on a sale of the same lands to him for a consideration of $5,000, dated June 19, 1844. This Court

held the first, or colonization grant, to be invalid because of want of compliance with any of the requirements of the act of 1824 and the regulations of 1828; and held the second alleged grant to be invalid for want of power in the governor to make it.

In the opinion of the Court, delivered by Mr. Justice Nelson, the following language occurs:

> "The main objection to this grant [the one made for a pecuniary consideration] is the want of power in the governor to make it; and this raises the question whether or not the governor possessed any power to make grants of the public lands independently of that conferred by the act of 1824 and the regulations of 1828." (1 Black, 550.)

And after a thorough discussion of all the laws of Mexico and Spain relating to the disposal of the public lands in the territories, the court decided the question which it had itself propounded in the negative.

In *United States* v. *Fuentes*, 22 How. 443, 454, the same doctrine is announced, and it was there said:

> "The act of 1824 and the regulations of 1828, are limitations upon the power of the governor to make a grant of lands."

In *United States* v. *Vigil*, 13 Wall. 449, 450, this Court, speaking by Mr. Justice Davis, again went into this question of the power of the territorial governors of the Mexican provinces to make grants of the public lands within their territories, especially one for a pecuniary consideration, and said:

> "It has been repeatedly decided by this Court, that the only laws in force in the territories of Mexico for the disposition of the public lands, with the exception

of those relating to missions and towns, are the act of the Mexican Congress of 1824 and the regulations of 1828. The avowed purpose of the Congress in enacting this law, and of the Supreme Government in carrying it into effect, was to colonize the public domain; to preserve it for settlement or cultivation. The favor of the legislature has, doubtless, been often abused by unworthy ministers in charge of the remote territories, but this consideration in nowise detracts from the wisdom of the policy on this subject. This policy recognized the obligation resting on the government to hold the public lands as a public trust, to be administered for the benefit of those who would settle upon them and cultivate them. THEY COULD NOT BE SOLD FOR MONEY, NOR GRANTED AWAY IN CONSIDERATION OF PAST PUBLIC SERVICES, NOR ON CONDITION OF MAKING PUBLIC IMPROVEMENTS OF USE TO THE TRAVELLING COMMUNITY. THE POWER TO CEDE THEM DEPENDED ENTIRELY UPON THE USES TO WHICH THEY WERE TO BE PUT, AND THESE, AS WE HAVE SEEN, WERE CULTIVATION OR SETTLEMENT. THE LEGAL RIGHT TO DISPOSE OF THEM FOR OTHER OBJECTS WAS WITHDRAWN FROM THE LOCAL AUTHORITIES AND RESTED ALONE WITH THE SUPREME GOVERNMENT."

Citing, among other cases, the case of *United States* v. *Vallejo*, above referred to.

In the light of these decisions, what is the predicament of this de Celis grant, made by this same Governor Pico on the 17th of June, 1846? What authority in law do we find for its existence? Was it, or did it purport to be, one in colonization, made under and by virtue of the authority of the act of the Mexican Congress of 1824, and the regulations of 1828? Unqualifiedly not. In the examination of the petition presented to the governor by de Celis (Rec. 233), the grant itself (Rec. 235), and the patent itself (Rec. 42), we look in vain for any reference to this colonization law and the regulations made to carry it into effect.

But what we *do* find is that it purported to have been made by the governor of the province *in consideration of a sum of money* alleged to have been paid therefor—that it was a sale upon a pecuniary consideration—a sale which, in the language of this Court in the cases above referred to, the governor of California in 1846, or at any other time, did not have the power under the law to make.

It seems so plain that this grant was in the very teeth of the law, that further discussion of it would appear to be a waste of words.

In the court below, we offered to prove that this alleged grant was void for the reasons here stated, and were refused that right. That refusal, we then said was error, and we say still was error; error which this Court has the power to correct, and ought to correct.

*Second.* But this alleged grant was absolutely null and void for still another reason. It was an attempted sale of Mission lands; and, under the laws of Spain and Mexico, the governor of California did not have any power or authority to make any sale of Mission lands for a pecuniary consideration. There cannot be any possible doubt of the correctness of this proposition. The identical question has been decided by this Court on more than one occasion.

It first arose in the case of *United States* v. *Workman*, 1 Wall. 745. That was a case in which the validity of an alleged grant made by this same Governor Pio Pico, on the 8th of June, 1846 (nine days prior to the alleged grant in the case at bar), of the Mission of San Gabriel, situate within a few miles of the Mission of San Fernando, which lands are the subject matter of this action. By a unanimous court, it was held that the governor of California did not have any authority, under *any* law, to make a grant of Mission lands, and the purported grant was therefore held

to be, and to always have been, void and of no effect in law. At the same time the court decided the case of *United States* v. *Jones*, in which a like decision was rendered in respect of the Mission of San Luis Rey, 1 Wall. 766.

Again, in the case of *Beard* v. *Federy*, 3 Wall. 478, 490, the same conclusion was arrived at in respect of a purported Mexican grant made by this same Governor Pio Pico on the 20th of June, 1846, three days after the alleged grant in this case. In the decision of the Court announced by Mr. Justice Field, who was perhaps without a peer in this country, in his knowledge of the Mexican laws relating to the disposition of the public lands by the governors of the Californias, the learned Justice said:

> "The Circuit Court, as already stated, treated the grant as one in colonization. This was the most favorable view for the defendants, FOR IF THE RECITALS THAT IT WAS MADE UPON A SALE OF MISSION LANDS, AND UPON AUTHORITY CONFERRED BY THE DEPARTMENTAL ASSEMBLY, ARE TO DETERMINE ITS CHARACTER, IT IS WITHOUT ANY EFFICACY IN PASSING THE TITLE. IT IS SIMPLY A VOID INSTRUMENT, AND FALLS DIRECTLY WITHIN THE DECISION OF THIS COURT IN *United States* v. *Workman*, 1 Wall. 745. In that case the powers of the Departmental Assembly in the alienation of lands were very fully and elaborately considered, and particularly its asserted power to authorize the governor to sell the Mission lands, and it was held that this body could not confer any power upon the governor, and that its own power was restricted to what was conferred by the laws of colonization, which was simply to approve or disapprove of grants regularly made by the governor *under those laws*."

See also the very learned decision of the Circuit Court of the United States for the Northern District of California in *Bouldin* v. *Phelps*. (30 Fed. Rep. 547.)

Some question has arisen whether the doctrine of *More* v. *Steinbach*, 127 U. S. 70, does not militate against the decisions in the cases of *United States* v. *Workman*, *United States* v. *Jones*, and *Beard* v. *Federy*, above referred to, especially as it would appear from a cursory reading of the decision of the court in that case that this Court itself had confirmed a grant of the Mission of San Buenaventura, made by Pio Pico on the 8th of June, 1846, to one Poli. But reference to the original records of this Court in the San Buenaventura grant (Case No. 302, December Term, 1868) shows that the question of the validity of the grant never came before this Court for consideration, notwithstanding the statement to that effect on page 84 of the decision in *More* v. *Steinbach*. The records show that the grant was confirmed by the board of land commissioners and also by the district court; but, notwithstanding the fact that the case came to this Court twice on appeal, we find that the first appeal was dismissed, and on the second appeal it was simply affirmed, *not upon consideration by the court*, but on motion of the Attorney General. (See order of March 2, 1869, in said case.) So that, this Court never did pass upon the validity of that pretended grant or ever have an opportunity to do so.

But even in that same case of *More* v. *Steinbach*, it was not even hinted that the decision in *United States* v. *Workman* was not the law. On the contrary, it was referred to with approval, and the statement was made that there must have been some exceptional circumstances which took the Poli grant out of the rule in the *Workman case*; and the court very properly said that it was bound to presume so, in the absence of any evidence to the contrary. What the exceptional circumstances were in that case have been stated above; and it is respectfully submitted that, in the light of those circumstances, there is no conflict with the doctrine of the older cases.

Moreover, as is fully pointed out in the brief of Mr. Montgomery, there was no attempt made in the trial of the case below in *More* v. *Steinbach*, to introduce any evidence to show the invalidity of the grant to Poli, as was done in the case at bar in respect of the de Celis grant; and that distinction alone is sufficient to differentiate that case from the case at bar.

The Supreme Court of the State of California, in its decision in the case at bar, undertook to distinguish this case from the cases of *Workman* and *Vallejo*, by saying that in those cases the grants had been finally decided to be void by this Honorable Court, while such was not the case in reference to this de Celis grant. If that is any logical distinction, we must confess that we are too obtuse to see it. The effect of that proposition is to hold that, in no instance and under no circumstances can any judgment be attacked collaterally for want of jurisdiction in the court rendering it. Such a proposition will not stand the test of the law an instant, and does not need any authorities to show its incorrectness.

For instance, can it be said that the power of the governor of California to make a valid grant of the Mission lands of San Gabriel, in the *Workman case*, and of the Mission lands of San Luis Rey, in the *Jones case*, and of lands of the public domain in the *Vallejo case*, existed up until this Honorable Court decided those cases at December Term, 1863 and that because the board of land commissioners, under the act of March 3, 1851, had confirmed those grants, and their decisions had been affirmed by the District Court of the United States for the Southern District of California, therefore, the grants were valid ones if no appeals had been taken to this Honorable Court? In other words, did the decisions of this Court in those cases *make those grants void?* Manifestly not. All that the decisions of

this Honorable Court did in those cases was to declare that those three purported grants had never had any validity—that they always had been void. The power of the courts is not to make laws, but to declare what the law is.

To state the proposition in still another form, generally. What was the effect of the judgments of this Honorable Court in the *Workman*, *Jones*, and *Vallejo* cases, in respect of the validity of the alleged grants in those three cases? Was it to declare that the judgments below would have been valid and would have stood against collateral attack but for the appeals to this Court? Certainly not. What this Court decided in those cases, and the effect of the judgments therein, was that the board of land commissioners, under the act of March 3, 1851, and the District Court did not have any jurisdiction to entertain a petition for the pretended grants of the Missions of San Gabriel and San Luis Rey or of the pretended grant in the *Vallejo case*. No other theory can be advanced on this point. Why were the petitions dismissed in those cases? Was it because of insufficient evidence to prove the existence of the ministerial acts of the governor in making the pretended grants? Or was it because of any fraud or mistake of any sort on the part of the pretended grantees? Not at all. The petitions were dismissed because of the absence of power and authority *under any law*, in the governor to make any one of the pretended grants; because these pretended grants never had had any validity at all; because they were grants over which the board of land commissioners appointed under the act of March 3, 1851, did not have any jurisdiction; because they were not grants of land or "claims to lands in California by virtue of any right or title derived from the Spanish or Mexican governments."

Such being the case, will it be contended for an instant that

the alleged grants in the *Workman*, *Jones*, and *Vallejo* cases could not have been attacked collaterally even if they had not been finally rejected by this Honorable Court in a direct proceeding? On this proposition, it would seem that there ought to be no doubt. The question of jurisdiction can always be inquired into, *in any court*, where the validity of a judgment comes up for consideration. This is so elementary that it is not thought necessary to cite any authorities to support it. A void judgment is void everywhere and for all purposes. It is no judgment at all. It never had any force or effect even in the court which rendered it, for the very obvious reason that that court did not have any jurisdiction to hear and determine the issues in the case in which such judgment was rendered.

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THE SUPREME COURT OF CALIFORNIA ALSO MISAPPLIED THE DOCTRINE OF THIS HONORABLE COURT ANNOUNCED IN THE CASE OF *Beard* v. *Federy*, 3 Wall. 478.

Inasmuch as the judgment of the Supreme Court of California in the case at bar was, or seems to have been, predicated largely upon this *Beard-Federy* case, and inasmuch as the other side also rely very largely on this same case to sustain their contention, it would seem to be necessary to examine this case somewhat carefully to see what it actually was and what it decided. In the view taken of this case by counsel for the plaintiffs in error it is not only *not* an authority in support of the judgment of the court below and the position taken by counsel for the defendant in error, but is, in fact, an authority against them, and is of the *very highest authority* in support of all the contentions made on behalf of the plaintiffs in error for a reversal of the judgment of the court below.

That case, like the one at bar, arose in California, and

was an action of ejectment. The plaintiff below, who was the defendant in error here, claimed title under a Mexican grant to the Bishop of Monterey of the Mission of San José, and the defendant below (plaintiff in error here), claimed title under and by virtue of an alleged grant made of the same lands by Governor Pico on the 20th of June, 1846, to one Castenada and others. The Bishop had presented his claim to the board of land commissioners under the act of March 3, 1851, which had confirmed it, and the confirmation had become final by reason of the dismissal by the United States of their appeal to the District Court; and, thereupon, a patent had issued by the United States to the Bishop for the claim. The alleged grant to Castenada and others had never been presented to the board of land commissioners.

On the trial of the case in the court below the plaintiff relied upon the patent to the Bishop and certain conveyances which placed in him whatever title had been possessed by the Bishop under the grant and the patent. The defendant attacked this title and sought to show that the claim of the Bishop never had had any validity, under the Spanish or Mexican laws, and for this purpose introduced in evidence the petition of the Bishop which had been presented to the board of land commissioners asking a confirmation of the claim. He also relied on the strength of his own title.

In the decision of this Honorable Court, the question of the validity of the title of the Bishop was gone into very fully, notwithstanding the fact that the party who derived title from him relied upon the patent of the United States to the land in dispute. This Honorable Court did not hold that no inquiry could be made into the validity of the claim which the Bishop had presented to the board of land commissioners as the basis of the right to a patent, as is con-

tended by the Supreme Court of California and counsel for the defendant in error in the case at bar, but, on the contrary, *did* proceed to make such inquiry for the expressed purpose of ascertaining whether the board of land commissioners had had jurisdiction to entertain the petition for confirmation. Having made this investigation for the purposes mentioned, and having ascertained from such investigation that the claim of the Bishop was "a claim to lands in California by virtue of a right or title derived from the Spanish or Mexican governments," and that, therefore, the board of land commissioners had *had* jurisdiction to entertain it and to confirm it, this Honorable Court very properly laid down the general doctrine relied upon by the court below and counsel for the defendant in error, as announced in the following language:

> "The board having acquired jurisdiction, the validity of the claim presented, and whether it was entitled to confirmation, were matters for it to determine, and its decision, however erroneous, cannot be collaterally assailed on the ground that it was rendered upon insufficient evidence. The rule which applies to other inferior tribunals applies here,—that when it has once acquired jurisdiction, its subsequent proceedings cannot be collaterally questioned for mere error or irregularity." (3 Wall. 489.)

But suppose, in the investigation of the claim by this Court, it had ascertained that the claim of the Bishop, as disclosed by his petition presented to the board of land commissioners, was *not* "a claim to lands in California by virtue of any right or title derived from the Spanish or Mexican governments" what would the judgment of this Honorable Court have been? Would any one have the temerity to assert that in such an event this Court would have held that the patent issued to the Bishop could not

have been attacked in that action? Would this Honorable Court have held that that patent conveyed a good and complete title to the premises in controversy, notwithstanding the fact that the claim on which it was based did not have any validity under the laws of the former governments? Would this Honorable Court have held that the patent issued by the United States to the Bishop was valid and could not be collaterally attacked, notwithstanding the fact that the board of land commissioners did not have any authority to confirm his claim? Manifestly not. The very gist of the decision and judgment of this Honorable Court on this point was, that in a case of this kind, in an action of ejectment, where the plaintiff had to rely upon the strength of his own title, the foundations of that title could be inquired into; and if it were shown that the foundations of the title were good; that the claim as presented to the board of land commissioners was a valid claim, under the laws of the former governments; that it was "a claim to lands in California by virtue of a right or title derived from the Spanish or Mexican governments;" that it was a claim which the board of land commissioners had jurisdiction to entertain and confirm,—then the patent issued by the United States on such confirmation could not be collaterally attacked. But that if none of those conditions of validity existed in the claim; that it was *not* a valid claim to lands *under the laws of the former governments*, then the board of land commissioners did not have any authority or jurisdiction to confirm it, and the patent issued by the United States on such void confirmation was itself absolutely null and void and could be shown to be so in an action of ejectment. In other words, the very gist of the decision and judgment of this Honorable Court in that case, on this point was, that THE JURISDICTION OF THE BOARD OF LAND COMMISSIONERS, IN CONFIRMING, OR

ATTEMPTING TO CONFIRM, THE CLAIMS TO LAND IN CALIFORNIA, WHICH HAD BEEN PRESENTED TO IT FOR CONFIRMATION, COULD BE INQUIRED INTO. And that was precisely what the Court did in that case.

Having found that the board *did* have jurisdiction to confirm the claim of the Bishop, it necessarily held that the title under which the plaintiff claimed was good and should prevail unless the defendant should produce a better title—one anterior in date. The court thereupon proceeded to inquire into the title of the defendant under the alleged Mexican grant made by Governor Pico on the 20th of June, 1846, to Castenada—a pretended grant on all fours with the de Celis grant in the case at bar—and held that it was invalid for several reasons, one of which was that *there was no power in the governor* at the date of the alleged grant, or at any other time, under the laws of Spain and Mexico, *to make a grant of Mission lands;* citing as its authority for such ruling the case of *Workman, supra.* But that feature of the decision and judgment of this Honorable Court in the *Beard-Federy* case has already been fully discussed in the earlier portions of this brief, and will not be further considered now.

Suffice it to say, that, as we read the case of *Beard* v. *Federy*, it sustains every proposition that we have advanced in the case at bar, and cannot be even tortured into being an authority against us. The court did there just what we have insisted from the beginning it should do here, viz., consider the petition that was presented to the board of land commissioners for a confirmation of the claim, notwithstanding the fact that a patent has been issued by the United States based upon such purported confirmation. What we endeavored to show in the courts below, and what we insist here we have the right under the law to show, is, that the petition presented to the board of land

commissioners by de Celis *on its face* showed that the claim for land which he had from the governor of California was not "a claim to land in California by virtue of any right or title derived from the Spanish or Mexican governments;" and that, therefore, the board did not have any jurisdiction to confirm it.

The lack of jurisdiction in the board of land commissioners to confirm this pretended claim appeared not only in the petition of de Celis for a grant (Rec. 233), but also in the grant itself (Rec. 235), and it likewise appears on the face of the patent itself (Rec. 42). Consequently, when the plaintiff in this case below offered the pretended patent in evidence as the source of its title, it had not made out any part of its case. It had only offered in evidence a pretended patent of the United States *which showed on its face* that it had been issued without authority of law, and was not worth the paper on which it was written. This purported patent showed on its face that it had been issued in virtue of a grant made by Pio Pico, on the 17th of June, 1846, for a consideration in money, of the ex-Mission of San Fernando; and inasmuch as this Honorable Court had previously decided over and over again that the governor of the Californias did not have any authority, under the laws of Spain or of Mexico, in 1846, or at any other time, to make any grant of lands in that territory except for colonization purposes, under the act of the Mexican Congress of 1824 and the regulations of the supreme government of 1828 to carry that act into effect, and that in no instance could the governorof the Californias sell the Mission lands—then, we say, this purported patent showed on its face that it was absolutely null and void; and had a demurrer to the evidence of the plaintiff in the court below been interposed, it ought to have been sustained.

There remains to be considered only one proposition, viz:

THIS ALLEGED GRANT BEING ABSOLUTELY NULL AND VOID, THE BOARD OF LAND COMMISSIONERS BEING WITHOUT JURISDICTION TO CONFIRM IT, AND THE PATENT BASED ON SAID VOID GRANT AND SAID VOID DECREE OF CONFIRMATION BEING ALSO, AND OF NECESSITY, NULL AND VOID, COULD THE DEFENDANTS IN THE COURT BELOW (PLAINTIFFS IN ERROR HERE) BE PERMITTED TO SHOW SUCH INVALIDITY BY INTRODUCING AS EVIDENCE THE PETITION AND GRANT PRESENTED TO THE BOARD OF LAND COMMISSIONERS AND ALSO THE PRETENDED DECREE OF CONFIRMATION, AS THE FOUNDATION OF THE TITLE UPON WHICH THE PLAINTIFF BELOW RELIED?

Reference has already been made to the case of *Beard* v. *Federy*, where the very thing which was attempted to be done on behalf of the defendants in the court below in this case, viz., to show that the grant, the decree of confirmation, and the patent issued thereon were null and void, was actually done in a case precisely like the one at bar in this respect.

But reliance is not placed on the *Beard-Federy* case alone. It is elementary that in an action of ejectment, the plaintiff must recover, if at all, on the strength of his own title and not on the weakness of the defendant's title. That elementary rule has been applied by this Honorable Court in a great many and variety of cases, involving almost every conceivable phase of land titles, especially where the title of the plaintiff in an action of ejectment was based upon a patent of the United States; and in no case, so far as our investigations have extended, has it ever been denied the defendant in an action of ejectment, to introduce evidence to show that the alleged patent under which the plaintiff claimed was null and void for want of power and authority in the officers of the government to issue it.

As was said by this Court, speaking by Mr. Justice

Lamar (a recognized authority on matters relating to the public lands), in *Knight* v. *U. S. Land Association*, 142 U. S. 161, 176:

> "Ever since the decision in *Polk's Lessee* v. *Wendall*, 9 Cranch, 87, it has been the settled law of this Court that a patent is void at law if the grantor State had no title to the premises embraced in it, or if the officer who issued the patent had no authority to do so, and that the want of such title or authority can be shown in an action at law;"

and in support of this doctrine, a long list of authorities was cited. It will not be necessary to refer the Court to all of those authorities or to analyze each particular case. It will be sufficient, no doubt, to refer to the general trend of the authorities, and to refer particularly to only a few of the cases which are most nearly like the case at bar. As we have already said, the general doctrine laid down in the case last cited is not, and cannot be, disputed. It is true, that in a majority of the cases in this Court, the defendant in the action of ejectment was relying upon some sort of title of his own, and not altogether on the weakness of the title of the plaintiff. But such was *not* the case in all of them, particularly in the cases of *Reynolds* v. *Iron Silver Mining Co.*, 116 U. S. 687, and *Doolan* v. *Carr*, 125 U. S. 618. In neither of these cases did the defendant in the action of ejectment in the court below have *any* title whatever to the premises in dispute, and in both of them they were permitted to show that the pretended title of the plaintiffs in said actions was null and void, although in both cases the plaintiffs were relying upon a patent from the United States which embraced the premises in controversy; and as proof positive that this question was considered by the Court, there is a dissenting opinion by Mr. Chief Justice Waite on the very point, he contending, in opposition

to the majority, that the defendants, not having any title at all, should not be permitted to attack the alleged title of the plaintiffs, which was a purported patent from the United States embracing the lands in dispute.

The opinions of the Court in both of those cases were delivered by Mr. Justice Miller, recognized by the bench and bar of this country as one of the ablest and most profound jurists that the country ever produced. In the opinion in the *Reynold's case*, the learned Justice said:

> "If there is any exception to the rule that in an action to recover possession of land the plaintiff must recover on the strength of his own title, and that the defendant in possession can lawfully say until you show *some* title, you have no right to disturb me, it has not been pointed out to us." (116 U. S. 692.)

That was a case in which the plaintiff in the trial court was the holder of a title under a United States patent for a tract of placer mineral ground. Within the limits of the placer patent, there were certain lodes which were known at the date of the issue of said patent to which the defendants did not have any title whatever, but they were working them for the ores therein. The plaintiffs brought an action to recover from the defendants the possession of the lodes, relying upon the placer patent, which, as before stated, embraced the premises in dispute.

On this state of the case, it was held that the plaintiffs could not recover, because their placer patent did not convey any title to the lodes, which were known at the date of the issue of their patent, even though the defendants were simply intruders upon the prior possession of the plaintiffs. The attention of this Honorable Court is especially invited to the language of the dissenting opinion in this case for a concise and clear description of the points

of difference between the opinion of the majority and the dissenting Chief Justice; and it is respectfully submitted, that the decision of the Court was in exact harmony with the contention of the plaintiffs in error here.

The case of *Doolan* v. *Carr, supra,* is another case in principle precisely like the one at bar on this point, the defendants in that case having stood in precisely the same position as respects the land there in suit as do the defendants in the case at bar in respect of the land here in controversy. That was an action of ejectment brought by the holder of a United States patent issued to the Central Pacific Railroad Company under the acts of 1862 and 1864, making a grant of public lands to said company, to recover 320 acres of land in the State of California. Subsequently to the issue of the patent to the railroad company, the defendants had gone upon the land and settled there, and had attempted to acquire title thereto under the pre-emption laws by going to the local office and tendering their pre-emption declaratory statements accompanied by the necessary fees in such cases. Their declaratory statements had been refused by the local land officers because the land had already been patented to the railroad company. But they still remained upon the land, and the action was brought to dispossess them.

Their defence to the action was, that the alleged patent under which the plaintiff claimed was absolutely void and a mere nullity, because the lands embraced within it, although within the primary limits of the grant to the railroad company, had been excepted from said grant for the reason that at the date of the grant and also at the date of the definite location of the road they were in a state of reservation, having been embraced within the limits of a Mexican grant which at that time was *sub judice;* and they offered to prove their defence by the introduction of the evidences of said Mexican grant, and that the lands were reserved from the

operation of the railroad grant by reason thereof. The plaintiff objected to the proof thus offered to be made by the defendants on the ground "that the United States patent cannot be collaterally attacked in this action; that it can be attacked by bill in equity only; that the said United States patent and the recitals therein contained are conclusive evidence in this action that the legal title to the lands therein described was granted and transferred by the United States to the grantee named in said patent, and, taken in connection with the deed from the railroad company to the plaintiff, is conclusive evidence of the plaintiff's right to recover." (125 U. S. 624.)

The court sustained the objection, and refused to allow said proof, or any part of it, to be made, to which the defendants excepted. The court then charged the jury that

> "the patent title to this land to the Central Pacific Railroad Company is conclusive in this case. It cannot be attacked in a collateral manner. If it can be attacked at all it is only by a direct proceeding for the purpose of vacating the patent; and, without further remark upon this, one way or the other, it may be sufficient to say that I charge you the law is that, so far as this case is concerned, the patent from the Government to the railroad company, the first patent introduced here, is conclusive of the rights of the parties in this case" (*Id.*, 624).

To this charge the defendants excepted; and the case in this Honorable Court was as to the correctness of the rulings of the trial court. In the language of the opinion delivered by Mr. Justice Miller:

> "The case before us turns upon the correctness of the ruling of the court on the proposition that in an action at law none of the evidence offered by the defendants could be received to impeach the validity of

the patent, and that such an issue as that attempted to be raised by the defendants could only be made by a suit in equity to set it aside." (*Ibid.*, 624.)

In disposing of this question, the learned justice said:

"There is no question as to the principle that where the officers of the Government have issued a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law, as distinguished from suits in equity, *subject, however, at all times to the inquiry whether such officers had the lawful authority to make a conveyance of the title.* But if those officers acted without authority; if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void—void for want of power in them to act on the subject-matter of the patent, not merely voidable; in which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and should therefore be avoided. The distinction is a manifest one, although the circumstances that enter into it are not always easily defined. It is, nevertheless, a clear distinction, established by law, and it has been often asserted in this Court, that even a patent from the Government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue. The decisions of this Court on this subject are so full and decisive that a reference to a few of them is all that is necessary." (*Ibid.*, 624.)

And then a full and complete analysis of most of the leading decisions of this Court on this question is made, commencing with *Polk's Lessee* v. *Wendall*, and running

down to the time of the decision of the Court in the case then under consideration. The result was, that in that case the judgment below was reversed and the case remanded to the Circuit Court for a new trial.

As above stated, Mr. Chief Justice Waite again dissented, not on the ground that the alleged patent under which the plaintiff claimed was not void, but only on the express ground that the defendants not having any title of their own were not in a position to set up the defence that said patent was null and void. Thus emphasizing the correctness of the very point and principle which is contended for on behalf of the plaintiffs in error in the case at bar.

The doctrine of this case has never been departed from or even questioned. Neither has it been explained away, as is suggested by counsel for defendant in error.

It seems unnecessary to review any of the other numerous cases in this Court holding the same doctrine. They are practically all referred to and considered in the case of *Doolan* v. *Carr*, and nothing that could be said in this brief would enlighten this Court on the principles so clearly expressed and set forth in that case.

In the light of the cases specifically referred to above, and in the light of the argument in the briefs of Mr. Montgomery already filed, it is respectfully, but most earnestly, insisted that the judgments of the courts below are erroneous and should be reversed, and the case remanded for a new trial, at which the defendants shall be permitted to show that the pretended patent under which the plaintiff asserts title is absolutely null and void, and does not, and cannot, operate as a conveyance of any title whatever.

It is not deemed necessary to refer to and explain *seriatim* all of the many decisions cited by counsel for the defendant in error in support of the position taken by them in this case. None of them are believed to have any application

to the questions involved herein; or, if they have any bearing on the case at all, they are not in conflict with any of the propositions which we have endeavored to present to the Court and which are relied on by the plaintiffs in error for a reversal of the judgment below.

The question of survey of the alleged grant prior to the issue of the pretended patent, and the facts in the record, are fully covered by the briefs of associate counsel, and will not be further discussed.

Upon the whole record, and under the law of the case, a judgment of reversal is confidently asked.

Respectfully submitted.

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